SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 14 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 848

RONALD AMES MAYERSOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL S. FAWER
19 East 70th Street
New York, New York 10021
Counsel for Petitioner

STUART G. SCHWARTZ
19 East 70th Street
New York, New York 10021
of Counsel

INDEX

	PAGE
The Opinion Below	1
Statement of Jurisdiction	2
Question Presented	2
Statutory and Constitutional Provisions Involved	2
Statement of the Case	2
Reasons For Granting The Writ	9
Conclusion	18

APPENDIX A—Opinion of the Court of Appeals	1a
APPENDIX B—Judgment of the Court of Appeals	7a
APPENDIX C—Order of the Court of Appeals Denying Petition for Rehearing	8a
APPENDIX D—Order of Mr. Justice Harlan Extending Time to File Petition	9a
APPENDIX E—50 United States Code App. Section 462(a)	10a
APPENDIX F—Rule 32(c), Federal Rules of Criminal Procedure	12a
APPENDIX G—Fifth and Sixth Amendments to the Constitution	13a
APPENDIX H—Excerpts from Docket Entries	14a

Citations

Table of Cases:

	PAGE
Alexander v. *United States*, 138 U.S. 353 (1891) ...	13
Breedlove v. *Beta*, 404 F.2d 1019, 1022 (5th Cir. 1968)	17
Calland v. *United States*, 371 F.2d 295 (7th Cir. 1966), cert. den. 388 U.S. 916 (1967)	12
Chapman v. *California*, 386 U.S. 18 (1967)	17
Emspak v. *United States*, 349 U.S. 190 (1955)	17
Gregg v. *United States*, 394 U.S. 489 (1969)	11, 12, 13, 15, 17
Kercheval v. *United States*, 274 U.S. 220 (1927) ..	13
Hoffman v. *United States*, 341 U.S. 479 (1951) ..	16
Malloy v. *Hogan*, 378 U.S. 1 (1964)	16
Massiah v. *United States*, 377 U.S. 201 (1964)	17
Miranda v. *Arizona*, 384 U.S. 436 (1966)	17
Pereira v. *United States*, 347 U.S. 1 (1954)	13
Simmons v. *United States*, 390 U.S. 377 (1968) ..	13
United States v. *Caserta*, 199 F.2d 905 (3d Cir. 1952)	13
United States v. *Christakos*, 83 F.Supp. 521 (N.D. Ala.), *aff'd sub. nom. Wollard* v. *United States*, 178 F.2d 84 (5th Cir. 1949)	11
United States v. *Conway*, 296 F.Supp. 1284 (D.C. D.C., 1969)	10, 11
Walder v. *United States*, 347 U.S. 62 (1954)	13n
Warren v. *Richardson*, 333 F.2d 781 (9th Cir. 1964)	11

PAGE

United States Constitution, Statutes and Rules:

Fifth Amendment 2, 13, 17

Sixth Amendment 2, 13

28 United States Code, Section 1254(1) 2

44 United States Code, Section 423 13

50 United States Code App. Section 462(a) 1, 2, 3

Federal Rules of Criminal Procedure,
Rule 32 .....2, 9, 11, 12, 13, 15, 16, 17, 18

Other Authorities:

Barnett and Gronewald, *Confidentiality of the Presentence Report*, 26 Federal Probation (March 1962) 9, 10

Brief for United States in *Gregg* v. *United States*, 394 U.S. 489 (1969) 11, 11n

8A Moore, Federal Practice, ¶32.03 (2d ed. 1969).. 14, 15

The Presentence Investigation Report, Publication No. 103, Division of Probation, Administrative Office of the United States Courts (February 1965) 9, 10

United States Probation Officers Manual, ¶ 6.20 (1962) 10, 16n

IN THE

Supreme Court of the United States

October Term, 1969

No.

RONALD AMES MAYERSOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Ronald Ames Mayersohn, prays that a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Second Circuit, entered on July 23, 1969, affirming a judgment of the United States District Court for the Eastern District of New York finding petitioner guilty of violating 50 United States Code App. Section 462(a) and sentencing him to imprisonment for a term of five (5) years.

The Opinion Below

The opinion of the Court of Appeals (Appendix A, *infra,* at 1a-6a) is reported at 413 F.2d 641. No opinion was rendered by the District Court for the Eastern District of New York.

Statement of Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1969 (Appendix B, *infra*, at 7a). A timely Petition for Rehearing was denied on September 15, 1969 (Appendix C, *infra*, at 8a). On October 6, 1969 an order was granted by Mr. Justice Harlan extending petitioner's time in which to file a petition for a Writ of Certiorari to November 14, 1969 (Appendix D, *infra*, at 9a). The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

Question Presented

Whether a jury conviction following withdrawal of a guilty plea should be permitted to stand where the prosecuting attorney used a defendant's presentence statement to the Probation Office to impeach him on a material fact put in issue by the government's principal witness.

Statutory and Constitutional Provisions Involved

The federal statutory and constitutional provisions involved are 50 United States Code, App. Section 462(a) (Appendix E, *infra*, at 10a-11a), Rule 32(c) of the Federal Rules of Criminal Procedure (Appendix F, *infra*, at 12a), and the Fifth and Sixth Amendments to the Constitution (Appendix G, *infra*, at 13a).

Statement of the Case

Petitioner was convicted after a jury trial on two counts of violating 50 United States Code, App. Section 462(a). Count One charged that petitioner knowingly and willfully evaded service in the Armed Forces of the United States

by causing submission of false and fraudulent information to his local draft board, which information stated that he was a member in a Reserve Unit of the Armed Forces when in truth and fact he was not. Count Two charged petitioner with knowingly and willfully being a party to the making of such false statement bearing upon his classification for service in the Armed Forces of the United States.

At the trial, petitioner admitted paying a sum of money to one Paul Miller* to get petitioner's draft classification changed from 1-A to 1-D as a member of the Armed Forces Reserves. The principal issue was whether petitioner believed that Miller would effect this change in classification by securing his actual admission into an Armed Forces Reserve Unit (748-52),** in which event there would have been no violation of Section 462(a), or whether, as Miller testified, he told petitioner that he would send a forged document, purporting to have been signed by a Reserve officer, to the local draft board *** (209-10).

This issue was focused upon from the very outset of the trial by extensive questioning of Miller and petitioner concerning the circumstances under which petitioner first approached Miller, the date when this occurred, and petitioner's draft status at the time. A sharp issue of fact arose between Miller's testimony and petitioner's as to whether petitioner had approached Miller before or after receipt of

---

* Miller had no official connection with the military.

** Unless otherwise noted, references in this Petition are to the pages of the stenographic minutes of the trial filed with the Clerk of this Court.

*** That this was the crucial issue in the case was clearly recognized by the Court of Appeals:

> In large measure the case hinged on whether the jury believed Miller or appellant on the question of appellant's knowledge that the Form DD44 sent to the local board was fraudulent. (Appendix A, *infra*, at 4a)

petitioner's induction notice, Miller testifying that the meeting occurred after such receipt while petitioner insisted it was before. Miller's version was calculated to support the government's claim that petitioner intended Miller to use fraudulent means to obtain the 1-D classification, first, because after an induction notice was sent out actual applications for admission to a Reserve Unit could not be accepted under existing Reserve regulations (192-93, 1255) and, second, because the imminence of induction would make it more likely that petitioner was prepared to resort to desperate means to avoid it (181-2). It was on this critical question that the prosecuting attorney sought to impeach petitioner by resorting to the use of a confidential statement made by him to a probation officer in the course of the preparation of a presentence report prior to the withdrawal of his guilty plea.*

The importance attributed by both sides to the question of whether petitioner approached Miller before or after receipt of the induction notice is apparent from an examination of pertinent portions of the testimony. Thus, Miller testified as part of the government's case-in-chief that when petitioner first came to him petitioner had already received his induction notice:

> Q. Where did this meeting take place? A. At my apartment, at 1261 Central Avenue in Far Rockaway.
>
> Q. Do you know whether or not anyone else was present? A. I'm not sure.
>
> Q. Did you have a conversation with him at that time? A. Yes, sir.
>
> Q. Would you tell us what was said? A. Mr. Mayersohn had received his draft notice.
>
> The Court: Did he say that?
> The Witness: Yes, sir, he did.

---

* Petitioner pleaded guilty on July 22, 1968, applied for leave to withdraw the plea on September 4, 1968, and was granted leave to, and did withdraw it on September 16, 1968 (Appendix H, *infra*, at 14a).

A. (continuing) And he came to me wishing to keep from going into service.

Q. Mr. Miller, you can only tell us what was said.

A. Yes, sir.

Q. Is that what he said? A. Yes, sir. (209)

Miller repeated this testimony in response to a leading question from the government (221), and again on cross-examination, when he explained that the reason he was able to remember specifically what he had told petitioner about the fraudulent nature of his plans was that, unlike the fifty or sixty other boys with whom he had similarly done business, petitioner had come to him after having received an induction notice (267-68).

On direct examination, petitioner denied that he had received his induction notice as claimed by Miller. He testified that their first contact occurred around the time he was advised that he had passed his physical examination, and that before talking to Miller he had contacted a number of Reserve Units which had advised him that no openings were available (745-47, 849). Throughout cross-examination, the prosecuting attorney made every effort to impeach petitioner's testimony that his first contact with Miller occurred *before* receipt of the induction notice:

Q. When did you receive your induction notice? A. I don't remember the exact date.

Q. Would it refresh your recollection that you received it six days after you received your statement of acceptability? A. If you say it's so.

Q. You are absolutely sure you had not received your induction notice? A. Yes, sir.

Q. But you are not sure of the exact time that you called up the reserve units? A. Yes, sir. (912)

* * *

Q. Now, you say you went to Paul Miller prior to receiving that induction notice? A. Yes.

Q. When did you go? A. I don't remember the exact date.

Q. How many days before receiving that induction notice? A. Pardon?

Q. How many days before receiving that induction notice? A. I really don't know. (926)

* * *

Q. Give us your best estimate.

* * *

A. Maybe three days prior.

You know you are asking me to speculate on a period of time that was four years ago.

Q. Mr. —

Mr. O'Brien: I withdraw that.

Q. It could have been three days prior? A. I really don't know.

Q. Was it before or after you called these Reserve units? A. It was after I called these Reserve units. (927)

* * *

Q. Why did you go at that time? A. Why did I go at what time?

Q. What caused you to go at that particular time? A. When I saw I could not get into a Reserve unit, I went to see Paul Miller.

Q. That was prior to receiving your induction notice? A. Yes, sir. (929)

* * *

Q. Didn't you tell us on direct examination that you went to Miller about a week or ten days before receiving your induction notice? A. Approximately

Q. You know that now as not correct; isn't that true? A. I still cannot tell you for sure the exact time that I went to Paul Miller. I can just give you an approximation.

Q. How can you tell us for sure that you went to Paul Miller before receiving your induction notice? A. Because I know I went to see him before.

Q. You don't know when you went to see him? A. No sir. (935)

Having totally failed to shake petitioner's testimony that he approached Miller before receipt of the induction

notice,* and faced with this flat contradiction of Miller's testimony, the prosecuting attorney sought to impeach petitioner by confronting him with an inconsistent statement made to Mr. Mundy, the probation officer who had interviewed him in the course of preparing the presentence report prior to petitioner's withdrawal of his guilty plea:**

> Q. What is the date of this meeting, the meeting where you gave [Miller] the address 103 Coombs Avenue? A. It could have been in September.
>
> Q. Could it have been in October? A. I really don't know, I really don't recall.
>
> Q. Could it have been in November? A. Could it have been in November?
>
> Q. Of 1964? A. No, sir.
>
> Q. Did you ever tell anybody that you had met Miller and given him the information in November? A. Not to my knowledge.
>
> Q. Did you ever meet a man by the name of Mundy? A. Yes.
>
> Q. Did you ever give him that information? A. Then I was mistaken because—
>
> The Court: He is just asking you did you give—I didn't get the name.
>
> Mr. O'Brien: Mundy.
>
> The Witness: Yes, sir, he was—
>
> Mr. Reiben: Which information was that?
>
> Mr. O'Brien: That he met Miller in November, that he gave Miller this information in November rather than September or October. (949-50)

---

* The induction notice was mailed to petitioner on October 15, 1964 (115).

** It should be noted that at this point in the cross-examination the only two persons in the courtroom who knew that Mr. Mundy was the probation officer who had interviewed petitioner were the prosecuting attorney and petitioner himself. Trial counsel, Stanley J. Reiben, Esq., had not represented petitioner prior to the withdrawal of the guilty plea and the name Mundy was unknown to him. It was not until petitioner left the stand at the end of the day that he was able to inform Mr. Reiben as to the nature of the statement used by the prosecuting attorney in cross-examination. Once apprised of the facts, counsel took appropriate exception to the use of the statement (1049-50).

Determined to get the substance of the alleged statement to Mundy before the jury, the prosecutor pursued the matter:

> Q. When you went to Miller you had not received your induction notice? A. No, sir.
>
> Q. You did tell Mr. Mundy you went to Miller in November? A. That would be impossible, sir, because I paid—
>
> Q. I asked you didn't you tell Mundy that? A. If I did—
>
> Q. I am asking you, did you? A. I really don't remember, sir. If you say I did, I did. (954-55)

The precise effect on the jury of this admission, obtained solely by reason of the prosecuting attorney's possession and use of material contained in the presentence report, is impossible to measure. It is clear, however, that, in the government's summation, the prosecutor saw fit to dwell at length on the very issue to which this admission related; namely, whether petitioner had approached Miller before or after receiving the induction notice (1181-82).

Similarly, in the trial court's charge, the question of whether it was petitioner or Miller who had told the truth on this important issue was duly emphasized (1254-55, 1260-61), and the jury instructed that "[o]f course one of these two witnesses is lying" (1261).

Petitioner was found guilty and sentenced to a term of five years.

On appeal the Court of Appeals conceded that "the use of this information was improper under Rule 32(c)(1) of the Federal Rules of Criminal Procedure. Cf. *Gregg* v. *United States,* 394 U.S. 489 (1969)", but summarily dismissed the error on the ground that "there was no way that the jury could have known that the information was

from a probation report or that the man to whom the statement was made was a probation officer. The jury could not have learned from this reference that appellant had previously pleaded guilty." (Appendix A, *infra,* at 5a).

Reasons for Granting the Writ

1. The availability to prosecutors of defendants' presentence probation interviews for use in obtaining convictions calls for the exercise of the Court's supervisory power over enforcement of Rule 32(c)(1) of the Federal Rules of Criminal Procedure.

The cornerstone of the entire federal sentencing structure is the presentence report and the most important component of that report is the statement of the defendant. When we consider the sensitive nature of the function called upon to be performed by the probation officer in interviewing the defendant, the absolute necessity for confidentiality becomes all too apparent. In a very real sense in our system of criminal justice the cubicle of the probation officer is the defendant's confessional and it is viewed as such by probation officers themselves. See, Barnett and Gronewald, *Confidentiality of the Presentence Report*, 26 Federal Probation (March 1962), pp. 27-8. The presentence interview is intended not to serve as part of our adversary system of criminal justice but rather to probe the innermost feelings of the defendant to determine what type of treatment will be best calculated to assist in his rehabilitation:

> The feelings of the defendant prior to the crime, during the commission of the crime, between the time of the crime and arrest, and after arrest are pertinent data in many instances. A person who had a feeling of remorse and concern before he was arrested is likely to be different from one who is neither

> remorseful nor much concerned until after he is apprehended. A person who carefully devises a plan, carries it out calculatingly and with confidence, and is caught because of some unanticipated circumstance or oversight, is likely to be different from one who commits a crime impulsively or who, with some reluctance, commits a crime in which he most likely will be caught.
>
> The attitude of the defendant toward his offense is significant in determining whether he should be considered for probation. *The Presentence Investigation Report*, Publication No. 103, Division of Probation, Administrative Office of the United States Courts (February 1965) p. 11.

Indeed, the official instructions to probation officers emphasize the non-adversary and intimate character of the presentence interview of the defendant:

> The ideal interview closes with full confidence on the part of the defendant in the probation officer's efforts and ability to render to the court a complete, accurate, and impartial picture. The defendant should be made to feel that it is to his advantage to cooperate with the officer in every respect. In working toward this objective the officer is laying the groundwork for subsequent interviews with the defendant, and for a cooperative supervision relationship if the defendant is placed on probation. The first interview usually is the most important contact the probation officer has during the entire period of investigation and supervision. He should make it as helpful and meaningful as possible both to himself and the defendant. *United States Probation Officers Manual* ¶ 6.20E, (1962).

Manifestly, if a defendant had any thought that a probation officer might disclose the information imparted by him to the office of the prosecutor, this would destroy the probation officer's ability to obtain an uninhibited statement from the defendant and damage any possible relationship between them:

> The defendant's formal allocution at the time of sentence is greatly supplemented by his candid and detailed interview with the probation officer. These interviews are very helpful to a sentencing judge and encouraged by the Court. If the defendant believed or had any cause to believe that his statements to the probation officer were to be turned over to the U. S. Attorney, it is certain that a valuable source of sentencing information from the defendant, and often other sources, would be compromised. *United States* v. *Conway,* 296 F. Supp. 1284, 1285 (D.C.D.C. 1969).

It is the viability of this very principle of confidentiality, embodied in Rule 32(c)(1), which is here at stake.

Rule 32(c)(1) of the Federal Rules of Criminal Procedure * embodies a strict policy of non-disclosure of the contents of a presentence report before conviction in order to preclude the possibility that material contained in the report, inadmissible on the question of guilt, comes to the attention of the trier of fact and thereby prejudices the determination of that question. See, *Gregg* v. *United States,* 394 U.S. 489, 492 (1969); Brief for the United States, at 12, *Gregg* v. *United States, supra*; *Warren* v. *Richardson,* 333 F.2d 781, 784 (9th Cir. 1964); *United States* v. *Christakos,* 83 F. Supp. 521, 525 (N.D. Ala. *aff'd sub nom. Wollard* v. *United States,* 178 F.2d 84 (5th Cir. 1949). Only last term this Court made abundantly clear that "the rule must not be taken lightly", and that it would countenance nothing less than strict compliance with it by deeming premature disclosure of the report even to the court as "error of the

---

* (c) PRESENTENCE INVESTIGATION.

(1) WHEN MADE. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

clearest kind". *Gregg* v. *United States, supra,* at 492.* It is apparent from the Court of Appeals opinion in this case that this Court's admonition with respect to violations of Rule 32(c)(1) has fallen on deaf ears.

In the *Gregg* case, as in the several other cases which have considered the issue, see, e.g., *Calland* v. *United States,* 371 F.2d 295 (7th Cir. 1966), cert. den. 388 U.S. 916 (1967), the alleged violation of the Rule was non-prejudicial in nature and invariably involved a technically premature disclosure to the *trial judge.* In the case at bar, however, the Court is confronted not with a mere technical violation of the Rule, but one which strikes at the very heart of it: the improper disclosure of the presentence report to the prosecuting attorney and his blatant use of the most confidential material contained in that report to affect the jury's determination of petitioner's guilt. For the first time, in the context of a specific case, this Court is made aware of an insidious practice existing in one of the busiest federal districts in the country which compromises the integrity of an arm of the judiciary, the Federal Probation Office. The very last thing that Office is intended to be is the investigative tool of the prosecuting attorney. But what else are we to consider it if statements elicited from a defendant, in confidence, are then made available to the prosecuting attorney for use against him?

By its decision in this case, the Court of Appeals has impliedly condoned this practice. Although that court conceded the impropriety of the disclosure to the prosecuting attorney, it ruled that only if through the use of information contained in the report the jury learned of the previously entered plea of guilty, would it reverse a con-

* The Solicitor General, in his Brief for the United States in the *Gregg* case, recognized that a presumption of prejudice flows from a violation of the Rule. See Brief for United States in *Gregg* v. *United States* at 6, 11 and 17.

viction. While it is true that this would have made the error more egregious, Rule 32(c)(1) was enacted not merely to preclude jury knowledge of a prior guilty plea, the inadmissibility of which had long been well established, *Kercheval* v. *United States*, 274 U.S. 220 (1927), but rather to prevent presentence material from coming to the attention of the trier of the facts. To say the least, the Court of Appeals' reasoning is beside the point. Its decision demonstrates a total misunderstanding of the purpose of the safeguards embodied in Rule 32(c)(1) and is in contradiction to the rationale previously enunciated by this Court in *Gregg* v. *United States*, *supra*.

Very much to the point, however, is the thrust of that court's decision that evidence admittedly obtained and used in violation of Rule 32(c)(1), as well as the Fifth and Sixth Amendments to the Constitution, *infra*, at 15-17, is nevertheless admissible on the question of guilt. Had petitioner's statement been made in the course of a hearing on a motion to suppress, it could not have been used as it was in this case. *Simmons* v. *United States*, 390 U.S. 377 (1968).* Had the government learned of such a statement made by petitioner in confidence to his wife, or to his attorney, it similarly would have been precluded from using it. See, *Pereira* v. *United States*, 347 U.S. 1, 6 (1954); *Alexander* v. *United States*, 138 U.S. 353, 358-60 (1891). Nor could it have used a statement made by him in confidence to another government agency. *United States* v. *Caserta*, 199 F.2d 905, 911 (3rd Cir. 1952); *cf.* 44 United States Code, Section 423. The spirit as well as the letter of Rule 32(c)(1) clearly mandates that a defendant's statement to a probation officer be afforded no less protection.

---

* There is clearly no question of any application of the doctrine of *Walder* v. *United States*, 347 U.S. 62 (1953) for the inquiry into the matter of whether petitioner's first contact with Miller had preceded or followed the induction notice was initiated by the government on its case-in-chief.

In the instant case, petitioner was interviewed by Probation Officer Mundy in some detail concerning the alleged commission of the crime, and this material was then disclosed to the prosecutor who effectively used it in obtaining a conviction. It is shocking that the probation officer permitted such material to be seen by the prosecutor.* It is even more shocking that the prosecutor dared to use it at the trial.

It is frankly almost impossible to assess how widespread is the practice whereby confidential information contained in presentence reports is improperly being disclosed to prosecuting attorneys. This is not to suggest that this practice is infrequent. Clearly, the likelihood of such abuse exists in every instance of a withdrawn guilty plea as well as the retrial of all cases reversed on appeal. And it is fair to assume that prosecuting attorneys are ordinarily sufficiently perspicacious to avoid revealing their access to such information on the record. The problem is of sufficient dimension, however, for a noted commentator to express the view that strong measures are needed to remedy the situation:

> With the stress by probation officers on confidentiality, it comes as a surprise to learn that the confidential nature of defendant's communications to the probation officer is not fully respected. While a probation officer is barred from testifying in court as to admissions made to him by the defendant, it appears that the prosecutor may have access to the files of the probation office under certain circumstances. Since the probation officer acts in the role of counselor to an offender on probation, a free exchange between them is highly desirable. This may

---

* The Office of the United States Attorney for the Eastern District of New York has never denied, either in the trial court or in the Court of Appeals, that it had improper access to the presentence report, nor has it suggested that this was but an isolated instance of improper conduct on the part of one Assistant United States Attorney.

> often involved the admission of past misdeeds, or disclosure of the misdeeds of friends and associates. The role of the probation officer is ambivalent enough as it is, without his providing a direct line to the prosecutor. If disclosure of information in probation files to defendant's detriment is being made with any frequency, perhaps legislative action is called for.

8A, Moore, Federal Practice, ¶ 32.03 at 3230-31 (2d ed. 1969).

This Court has made known the importance it places on strict adherence to Rule 32(c)(1). *Gregg* v. *United States, supra*. What is obviously still needed, in light of the Court of Appeals decision herein, is a clear demonstration of the sanctions to be imposed on violations of this Rule. The present case provides the perfect vehicle for the Court, in the exercise of its supervisory power, to place a firm quietus on such blatant violations of the Federal Rules, and to do so before this insidious practice becomes so widespread that the integrity of the Federal Probation Office is hopelessly undermined.

2. The Court should proscribe the use at trial of presentence statements secured by the Probation Office from defendants without observance of the Constitutional safeguards applicable to interrogations by investigative arms of the government.

The constitutional dimension of the issue before the Court becomes apparent when one considers the circumstances under which statements are obtained by the Probation Office from a defendant. The importance of the presentence report to the sentencing process, particularly the statement of the defendant contained therein, has been so well recognized as to require no further elaboration. And it is abundantly clear to members of the criminal defense bar that the ultimate fate of their client before the sentencing court rests in large measure on such report.

Defense counsel have been led to believe that the furnishing of a defendant's statement for purposes of the presentence report is so far outside the normal criminal adversary proceeding that even advice of counsel can be dispensed with at such time. This belief is fostered by the Probation Office itself, which in the experience of the writer, invariably requests that counsel absent himself during interviews of the defendant.*

For these reasons criminal defense attorneys are usually most cooperative in making their clients available for interviews by the Probation Office, despite the fact that a defendant could choose to assert his privilege against self-incrimination and refuse to answer any questions concerning the crime in question. *Cf. Malloy* v. *Hogan*, 378 U.S. 1, 11-12 (1964); *Hoffman* v. *United States*, 341 U.S. 479, 486-87 (1951). The obvious reason why the latter course is not chosen is that defense counsel operate on the heretofore reasonable assumption that statements made by a defendant to a probation officer will not be used against him in any criminal proceeding, but will be made available only to the court at the appropriate time in conformity with Rule 32(c) of the Federal Rules of Criminal Procedure. Were it otherwise, no defense attorney could ever advise his client to cooperate with the Probation Office for fear of the use to be made of such statements against him.**

---

* "The ideal interview situation . . . is *alone* with the defendant at the office or at his home." United States Probation Officers Manual, ¶ 6.20D (1962).

We have been advised by Stanley Arkin, Esq., petitioner's counsel at the time of the presentence report interview, that he brought petitioner to Probation Officer Mundy's office and then absented himself therefrom.

** This would be true whether the defendant pleaded guilty or was convicted after trial. In the former situation, the attorney would, by necessity, have to consider the possibility of a subsequent withdrawal of the plea and the use of the statement at trial, as did occur

If probation officers may disclose a defendant's statements to the prosecuting attorney for the latter's use against defendant, as was done in this case, then the panoply of constitutional protections which normally surround statements obtained from the accused by investigative arms of the prosecutor must be applied to presentence interviews as well. Since petitioner's statement to Probation Officer Mundy was elicited without notification that it could be turned over to the prosecuting arm of the government and used against him at trial, it was obtained in violation of the procedural safeguards mandated by this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436, 469 (1966). Accordingly, the use to which it was put was not only constitutionally impermissible under that decision, but also under the rule in *Massiah* v. *United States*, 377 U.S. 201 (1964). Moreover, neither petitioner nor counsel who represented him at the time the statement was made could reasonably be deemed to have knowingly waived petitioner's Fifth Amendment privilege against self-incrimination. *Miranda* v. *Arizona*, *supra* at 476; see also *Emspak* v. *United States*, 349 U.S. 190, 196-99 (1955).

The damaging manner in which this statement was used has already been amply demonstrated. See *supra*, at 3-8; *cf. Breedlove* v. *Beta*, 404 F.2d 1019, 1022 (5th Cir. 1968). In view of the presumption of prejudice which must flow from the admitted violation of Rule 32(c)(1) standing alone, *Gregg* v. *United States*, *supra*, it is respectfully submitted that the concomitant constitutional error cannot be deemed to have been harmless to the determination of petitioner's guilt or innocence beyond a reasonable doubt. See *Chapman* v. *California*, 386 U.S. 18 (1967).

---

in this case. In the latter, the danger of use of the statement upon retrial, in the event of reversal on appeal, would be equally present.

Of course, this would place defense counsel in the untenable position of having to choose between refusing to cooperate with the Probation Office, and the attendant effect such refusal would have on the sentencing court, and the risk that cooperation could result in defendant's statement being used against him in a subsequent criminal proceeding.

Conclusion

If the Court of Appeals' decision in this case is not reversed, it will have a truly debilitating impact on the effectiveness of the Probation Office in assisting the courts in the sentencing process. For, if defense attorneys are hereafter forced to consider the Probation Office as merely an arm of the prosecuting attorney, and the presentence report as nothing more than another investigative weapon, then the source of the single most important part of the report, the defendant's statement, will dry up. But defendant's statement to the Probation Office is too important to the sentencing court as well as to the defendant to permit this. And the interview itself is so fraught with constitutional overtones as to allow no conduct on the part of the prosecution to violate its confidentiality.

This court has the opportunity in this case, through the exercise of its supervisory power over the enforcement of the Federal Rules of Criminal Procedure and as the final arbiter of the constitutional rights of defendants in criminal cases, to make perfectly clear that violations of Rule 32(c)(1), particularly those as outrageous as the one present in this case, will not be countenanced; that prosecuting attorneys throughout the federal system are neither to seek nor use the confidential material contained in probation reports; and that the integrity of the Probation Office and its function, like that of the court itself, cannot be compromised.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL S. FAWER
Counsel for Petitioner

STUART G. SCHWARTZ
of Counsel

APPENDIX A

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 660—September Term, 1968.

(Argued June 16, 1969 Decided July 23, 1969.)

Docket No. 33259

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD AMES MAYERSOHN,

Appellant.

Before:

HAYS and FEINBERG, *Circuit Judges,* and JAMESON, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York, Joseph C. Zavatt, *Chief Judge,* convicting appellant, after a jury trial, of evasion of military service in violation of 50 U.S.C. App. §462(a) (1964), as amended, 50 U.S.C. App. §462(a) (Supp. IV 1965-68).

Affirmed.

---

* Of the District of Montana, sitting by designation.

STANLEY J. REIBEN, New York, New York (Abraham Glasser, New York, New York, of counsel), *for Appellant.*

VINCENT J. FAVORITO, Assistant United States Attorney (Vincent T. McCarthy, United States Attorney for the Eastern District of New York, of counsel), *for Appellee.*

HAYS, *Circuit Judge*:

Ronald Ames Mayersohn appeals from a judgment of the United States District Court for the Eastern District of New York, convicting him, after a jury trial, on one count of evasion of military service by fraudulent claim of membership in a reserve unit and one count of making a false statement bearing upon his classification for military service, in violation of 50 U.S.C. App. §462(a) (1964), as amended, 50 U.S.C. §462(a) (Supp. IV 1965-68). We affirm the judgment.

I.

Appellant registered with Local Board No. 6, Valley Stream, New York on September 27, 1960. He was classified I-A on February 8, 1962. During 1963 and 1964 appellant sought unsuccessfully to obtain first a hardship deferment and then a medical deferment. By the late summer or early fall of 1964, appellant no longer expected to be exempted from the draft on medical grounds. He telephoned several reserve units in the New York area but was told that they had no vacancies and long waiting lists. He then called Paul Miller, who was thought to have influence in getting men into the reserves, and arranged a meeting at Miller's apartment.

According to Miller's testimony, he told appellant that, in return for a payment of $3000, he could keep him out of the service by submitting a fraudulent Form DD 44 which would state that appellant was serving in a reserve unit. Miller said that the reserve unit would not hear of appellant and that the local board would give him the classification given to people in the reserves, I-D, after they received the Form DD 44. Miller then wrote down appellant's name, address, date of birth, Selective Service number and local board number.

According to appellant's testimony, he believed that he was simply purchasing Miller's influence to get him into the reserves; he stated that he did not suspect that Miller would cause his draft board to receive fraudulent papers saying he was in the reserves. He said Miller told him that he would be put in a "control" unit which would mean that he would have an inactive reserve status until he was called for training or duty. He testified that he believed this description of the status Miller would obtain for him.

Evidence was adduced to show that appellant paid Miller by two checks, one for $2000 in late October, 1964, and one for $500 in January, 1965. It is undisputed that Miller gave Gottfried, his confederate, the information appellant had furnished and that Gottfried mailed a fraudulent Form DD 44 to appellant's local board for which act he was paid $200.

On October 15, 1964, appellant was ordered to report for induction on November 19, 1964. The local board received the fraudulent Form DD 44 on October 21. The form stated that appellant had enlisted in the reserves on October 16, 1964, and that he was serving satisfactorily with the 89th Air Terminal Squadron, Maguire Air Force Base, New Jersey. On October 22, 1964, the local board sent appellant a letter canceling the order of induction and on November 18, 1964, appellant was given classification of I-D which indicates that the registrant is serving in the reserves.

II.

There was sufficient evidence for the case to go to the jury. In large measure the case hinged on whether the jury believed Miller or appellant on the question of appellant's knowledge that the Form DD 44 sent to the local board was fraudulent. The jury could properly believe Miller and conclude that appellant was guilty beyond a reasonable doubt.

III.

Appellant's primary contention on this appeal, as stated in his brief, is that he was denied a fair trial and effective assistance of counsel "by pervasive misconduct of the trial judge manifesting hostility to the defense, prejudged belief in the defendant's guilt, disrespect towards and demeaning of defense counsel whose effective performance of his duties was thereby thwarted, and above all an unjudicial zeal in aid of the prosecution especially at the most vital junctures in the taking of the trial proofs, all of which must have conveyed to the jury too strong an impression of the Court's belief in the defendant's guilt to permit the jury freely to perform its own function of independent determination of the facts."

We have reviewed the record to ascertain whether appellant was prejudiced by the alleged incidents of judicial misconduct. It is true that the judge was occasionally rude to appellant's counsel and that he frequently interrupted appellant's counsel during the questioning of witnesses. However, it does not appear either that the judge took over such a large part of the trial as to deny defendant effective representation (see *U. S.* v. *DeSisto*, 289 F. 2d 833 (2d Cir. 1961)) or that the character of his colloquies with counsel was such as to lead the jury to believe that in his opinion the defendant was guilty (see *U. S.* v. *Guglielmini*, 384 F.

2d 602 (2d Cir. 1967)). Moreover, some of the judge's comments were provoked by counsel's irritating conduct.

IV.

Appellant contends that he was prejudiced because the prosecutor in questioning defendant at trial, referred to a statement made by defendant which appeared in a probation report prepared before trial when defendant entered a guilty plea that was subsequently withdrawn. The use of this information was improper under Rule 32(c)(1) of the Federal Rules of Criminal Procedure. Cf. *Gregg* v. *United States*, 394 U.S. 489 (1969). However, there was no way the jury could have known that the information was from a probation report or that the man to whom the statement was made was a probation officer. The jury could not have learned from this reference that appellant had previously pleaded guilty. Appellant's point does not entitle him to the relief he seeks.

Appellant reads Section 18 U.S.C. §3500 (1964) too broadly in arguing that it entitles him to all materials relating to the activities of Miller and his confederate, Gottfried. Section 3500 only requires the production of statements relating to a witness' direct testimony. See *United States* v. *Birnbaum*, 337 F. 2d 490 (2d Cir. 1964). The judge correctly applied Section 3500 in ruling on counsel's requests for statements in the possession of the government. Moreover, we have examined the statements which the judge refused to order the government to turn over and we find that they do not contain any material that appellant was entitled to have.

Miller's testimony about Gottfried and Gottfried's testimony were not hearsay and were admissible to prove the charge that appellant made a false statement affecting his classification for military service.

It was not improper for an F.B.I. agent to give hearsay testimony to the grand jury as to Miller's activities, rather than having Miller testify himself. *Costello* v. *United States*, 350 U.S. 359 (1956). Moreover, the admonition of *United States* v. *Umans*, 368 F. 2d 725, 730 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967), was not violated. Here Miller was not called because he was a prospective defendant.

The charge as to accomplice testimony was very similar to the charge approved in *United States* v. *Mattio*, 388 F. 2d 368 (2d Cir.), cert. denied, 390 U.S. 1043 (1968).

Appellant's other contentions are equally without merit.

Appellant's assertion that the Selective Service Act is unconstitutional was not raised below and is made here without supporting argument. We deny his request that he be permitted to substantiate this contention after the American Civil Liberties Union has announced its contentions concerning the constitutionality of the Act.

Affirmed.

APPENDIX B

(Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July, one thousand nine hundred and sixty-nine.

Present:

HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,

Circuit Judges,

HON. WILLIAM J. JAMESON,

District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD A. MAYERSOHN,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FESSARO
Clerk

APPENDIX C

(Order of the Court of Appeals Denying Petition for Rehearing)

33259

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD A. MAYERSOHN,

Defendant-Appellant.

—o—

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

September 15, 1969

APPENDIX D

(Order of Mr. Justice Harlan Extending Time to File Petition)

No. —October Term, 1969

—o—

RONALD AMES MAYERSOHN,

Petitioner,

v.

UNITED STATES

—o—

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 14th, 1969.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States

Dated this 6th day of October, 1969.

APPENDIX E

(50 United States Code App. Section 462(a))

§ 462. Offenses and Penalties.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in

any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing.

APPENDIX F

(Rule 32(c) of the Federal Rules of Criminal Procedure)

(c) PRESENTENCE INVESTIGATION

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

APPENDIX G

(Fifth and Sixth Amendments to the Constitution of the United States)

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX H

(Excerpts from Docket Entries)

Date	*Proceedings*
7-22-68	Before Mishler J.—Case called—Deft. and counsel Harris Steinberg present—Trial ordered and Begun—Stipulation of Waiver of trial by jury signed and approved by Court—Deft. after being advised of his rights and under Youth Corrections Act withdraws his plea of not guilty during trial and enters a plea of guilty to Count (2)—Def. O. R. sentence adjourned without date. Trial concluded.
9- 4-68	Notice of Motion of Stanley J. Reiben for an order pursuant to Rule 32d to withdraw his plea of guilty and to vacate his waiver of trial by jury and to file and enter a plea of not guilty etc., returnable Sept. 9, 1968 filed.
9- 9-68	Affidavit of Thomas J. O'Brien filed.
9- 9-68	Before Dooling, J.—Deft. motion to withdraw plea of guilty, etc. referred to Judge Mishler.
9- 9-68	Before Mishler, J.—Above motion submitted.
9-16-68	Before Mishler, J.—Hearing held on motion to withdraw plea of guilty. Case called. Deft. and counsel Mr. Reiben present. Hearing Ordered and Begun. Motion to withdraw plea of guilty granted. Case referred to Chief Judge Zavatt for trial date. Hearing concluded.
9-16-68	Notice of Appearance filed.
9-25-68	Before Zavatt, Ch. J.—Case called. Deft. and counsel Mr. Reiben present. Case set for trial on Sept. 27, 1968 before Judge Zavatt.

LIBRARY
SUPREME COURT, U. S.

No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1969

RONALD AZRIE MAYERSOHN, PETITIONER

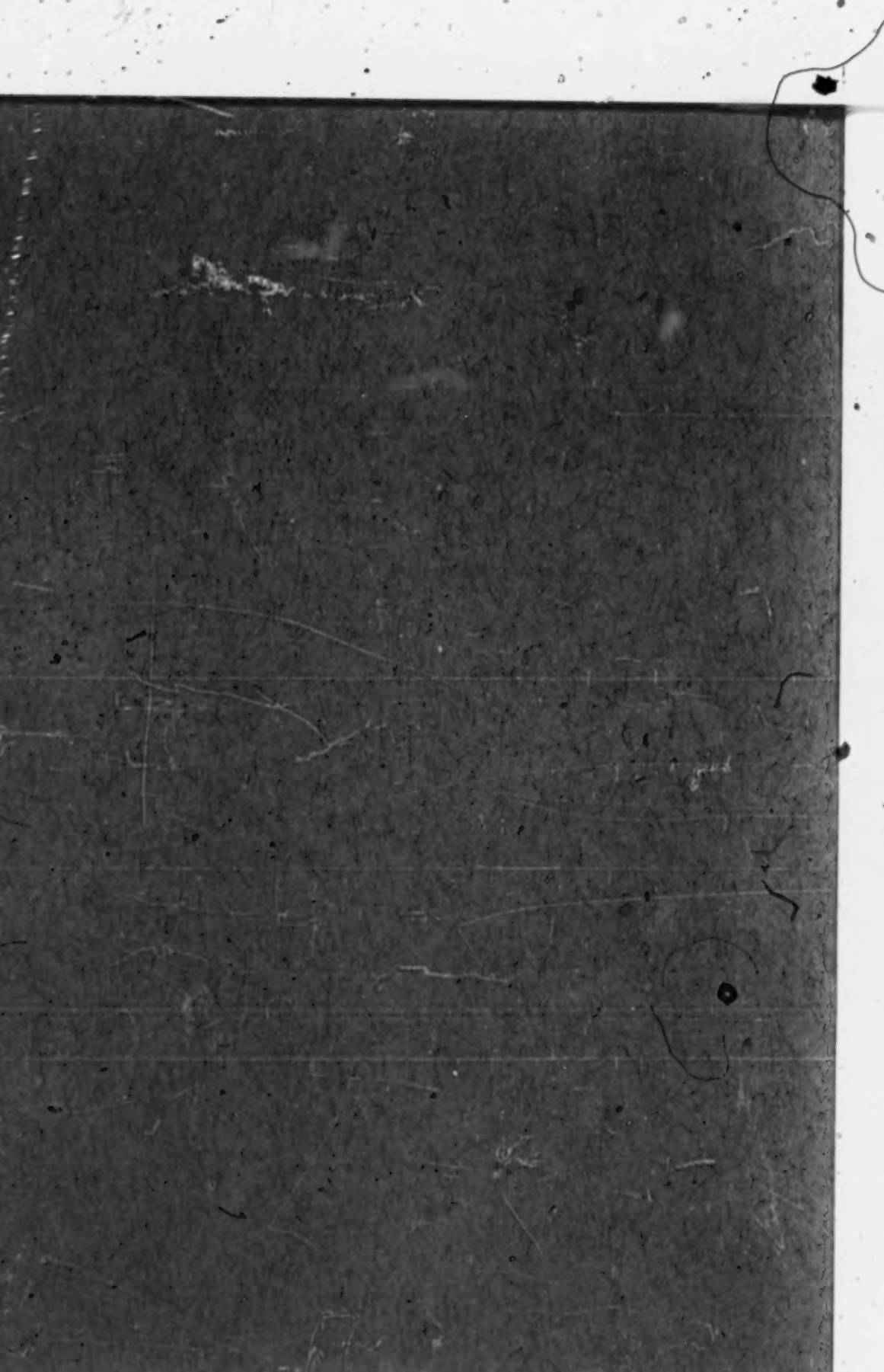
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 848

RONALD AMES MATERSOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–6a) is reported at 413 F. 2d 641.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1969. A petition for rehearing was denied on September 15, 1969. On October 6, 1969, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to November 14, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

374-346—70

QUESTION PRESENTED

Whether government counsel's question on cross-examination to petitioner (who had previously pleaded guilty and then withdrawn his plea) whether he had made a certain statement to an individual who was in fact a probation officer, but was not identified as such to the jury, constituted prejudicial error.

STATEMENT

Petitioner was convicted, after a jury trial in the United States District Court for the Eastern District of New York, on two counts charging, respectively, evasion of military service by a fraudulent claim of membership in a reserve unit and the making of a false statement bearing upon his classification for military service, both in violation of 50 U.S.C. App. 462(a). He was sentenced to five years' imprisonment.

The government's evidence showed that petitioner had paid $2,500 to one Paul Miller, in return for which Miller arranged for a fraudulent Form DD 44 to be submitted to petitioner's local board indicating that petitioner was a member of and serving satisfactorily in a reserve unit. As a result of the submission of that form, petitioner's notice of induction, which had previously been issued, was cancelled. Miller testified that petitioner was aware that the form would be submitted containing false and fraudulent information and that he would not actually be enrolled in a reserve unit. Petitioner testified that, to the contrary, he believed that he was purchasing no more than Miller's influence to obtain entry for him

into the reserves after he had been unable to obtain entry by his own efforts.

Petitioner had previously pleaded guilty to the second count of the indictment, and thereafter had withdrawn his plea. Prior to withdrawal of the plea, he had been interviewed by a probation officer named Mundy. On cross-examination, petitioner was asked when he had given certain information to Miller, and replied that it could have been in September (Tr. 949). When asked if it could have been in November, he replied in the negative (*ibid.*).[1] He was then asked if he had told Mundy that he had given the information to Miller in November rather than September, and replied: "Then I was mistaken because——" (Tr. 950). After further cross-examination, during which he denied that he had approached Miller after receiving his induction notice, he was asked: "You did tell Mr. Mundy you went to Miller in November?" (Tr. 954). After first replying that it would have been impossible (*ibid.*), he said: "I really don't remember, sir. If you say I did, I did" (Tr. 955).

Mundy was never identified to the jury as a probation officer. After the close of testimony and prior to

[1] The inquiry was relevant to resolving a conflict in testimony between him and Miller. He could not have lawfully altered his draft status by entering a reserve unit after receiving his notice of induction (which was mailed to him on October 15), and hence, it could be inferred, if he supplied Miller with pertinent information after receiving the notice, that he knew that Miller's efforts on his behalf would be fraudulent. The fraudulent Form DD 44 was in fact received by petitioner's local board on October 21.

summations, petitioner's counsel asked that Mundy's position be identified for the record (Tr. 1048). He requested that the fact that petitioner had originally pleaded guilty be kept from the jury (Tr. 1049), and made only the unspecific suggestion that the court "could make any sort of comment that he thinks is fit" (Tr. 1049–1050). The question of whether government counsel had seen and made improper use of the probation report was never raised. The court ruled that there was no way in which Mundy's identity could properly be brought to the attention of the jury, and that, except for informing the jury, his identity was now a matter of record (Tr. 1049–1050).

The court of appeals ruled that the question should not have been asked, but was in context harmless since the jury never learned that Mundy was a probation officer (Pet. App. 5a).

ARGUMENT

The court below was justified in concluding that, on the particular facts of this case, the questioning of petitioner as to what he had told Mundy did not constitute reversible error.

The question itself was but a minor part of a lengthy cross-examination. Moreover, petitioner's answer to the question was equivocal; the question did not in fact draw from him an admission damaging to his defense. The jury was not informed that Mundy was a probation officer, and hence had no way of knowing from the question that petitioner had previously pleaded guilty.

Petitioner endeavors to give general significance to the instant case by making the assumption from government counsel's questioning (1) that he had seen the presentence report and (2) that it is a general practice in that district for government counsel to see such reports prior to trial when guilty pleas are withdrawn. Petitioner asserts that the government "has never denied, either in the trial court or in the Court of Appeals, that it had improper access to the presentence report" (Pet. 14). As noted in the Statement, the question was never raised in the trial court. The government attorney who tried the case left office before the appeal was briefed; the attorney who prepared the brief and argued the appeal on the government's behalf consulted only the record and not the attorney who had tried the case.

In view of the assumptions made by petitioner's counsel, we have investigated the matter in some detail. We are informed that the policy obtaining in the district here involved is that probation reports are not made available to the government even when they are given to defendants, despite the provisions of Rule 32(c)(2), F.R. Crim. P., in this regard. The former Assistant United States Attorney who tried the case informs us that he in fact did not see the report relating to petitioner. He said that his questioning was based instead on a calculated guess that petitioner might have made such a statement to the probation officer, since as a matter of policy probation officers seek to obtain admissions of the details

of their guilt from defendants who plead guilty.[2] While we believe that, even so, such questions should not have been asked, the issue has none of the general implications with which petitioner seeks to endow it. The question is simply one of harmless error on the particular facts. That question was properly resolved against petitioner by the courts below, and further review is not warranted.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

JANUARY 1970.

[2] The former government attorney acknowledged that he had made inquiries of probation officers as to admissions of guilt made by other defendants who had pleaded guilty. Petitioner was one of a large number of defendants who were indicted on the basis of their transactions with Miller. Many pleaded guilty, but some, like petitioner, contested their guilt, either initially or eventually. All of the latter asserted that they believed that Miller was actually going to obtain entry for them into a reserve unit. Since the government's case in all instances depended primarily upon the testimony of Miller, the former government attorney wanted to assure himself that he was not obtaining convictions on the basis of perjured testimony. He therefore inquired of probation officers in a number of instances whether defendants who pleaded guilty acknowledged their awareness that fraudulent information had been submitted to their local boards by Miller on their behalf.

U.S. GOVERNMENT PRINTING OFFICE: 1970

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 29 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 848

RONALD AMES MAYERSOHN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER MAYERSOHN

MICHAEL S. FAWER
19 East 70th Street
New York, New York 10021
Counsel for Petitioner

STUART G. SCHWARTZ
19 East 70th Street
New York, New York 10021
of Counsel

IN THE

Supreme Court of the United States

October Term, 1969

No. 848

RONALD AMES MAYERSOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER MAYERSOHN

The Government does not dispute that, if the prosecutor had access to petitioner's confidential statements to the probation officer and used them in cross-examining petitioner, a serious violation of petitioner's rights resulted, with broad statutory and constitutional implications. Its efforts in its Brief in Opposition to avoid coming to grips with this issue is a masterpiece of casuistry. First, it very subtly equates access with a reading of the probation report itself. Then, suggesting for the first time that this issue was not properly raised below, the Government informs us that post-Petition investigation reveals that the prosecutor did not, in fact, have access to the probation report and thus no violation occurred. The argument fails, not only because it is logically unsound, but because it wholly ignores a portion of the certified record which destroys its factual premise.

1. Contrary to the Government's contention, the issue in this case does not hinge upon whether or not the prosecuting attorney actually *saw* the probation officer's pre-

sentence report. What petitioner has consistently contended is that a statement given by him in confidence to the Probation Office was revealed to the Office of the United States Attorney and then used against him at trial in securing his conviction. The manner in which such statement was obtained by the prosecution, whether it was in the form of a response to oral inquiries of the probation officer, or by a reading of the report prepared by him, is beside the point. Obviously, the evil was accomplished regardless of the means employed.

2. The Government tries to side-step the issue inherent in such prosecutorial misconduct by the simple expedient of alleging, for the first time, that such misconduct did not occur.* Well aware that in arguing the case before the Court of Appeals the Government assumed the very misconduct it now denies, the Government argues that since the issue was not properly raised below, the prosecuting attorney who tried the case was never afforded an opportunity, on the record, to affirm or deny his improper access to the confidential information. The patent inaccuracy of this misrepresentation is apparent from a reading of that portion of the record below containing petitioner's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.**

The Government was represented in the trial court on this motion by the very same prosecuting attorney who had tried the case. Defense counsel, in unsuccessfully urging that the prosecutor's cross-examination of petitioner

---

* Notably the Government's denial is more significant for what it leaves unsaid than for what it claims did not occur. The Government artfully couches its denial in terms of the prosecutor *not seeing the probation report* but carefully refrains from denying that the prosecuting attorney was *told* by the probation officer of petitioner's statement to him (Brief in Opposition, at 5).

** This portion of the trial record was filed in this Court as part of the certified record and is contained in a transcript dated December 20, 1968.

Mayersohn concerning statements made by petitioner to Probation Officer Mundy was grounds for a new trial, stated (transcript of Dec. 20, 1968, at 12-13):

> ". . . it was a direct violation of the statute, of Rule 32(c) of the Federal Rules of Criminal Procedure, which restricts in the most careful way the circumstances in which a probation officer may be disclosed to anyone. There are no cases because I suppose it never occurred before—certainly it never occurred before in my experience *where a probation officer's statement elicited from a Defendant awaiting possible sentence was turned over to a prosecutor for use on the trial of that Defendant.*" (Emphasis added.)

The record of those proceedings will be searched in vain for the prosecuting attorney's denial of this crystal-clear allegation of improper conduct on his part. Instead, he chose to remain silent, never disputing the precise fact which defense counsel, the Court of Appeals and we, in our Petition to this Court, properly assumed to be true. It now ill behooves the Government to seek to avoid the consequences of its tacit admission in the trial court and to dispute, by unsworn hearsay, the factual premise upon which it argued the issue in the Court of Appeals.*

---

* In view of the prosecutor's specificity in cross-examining petitioner (Petition, at 7-8), and his admitted practice of speaking to probation officers about these cases (Brief in Opposition, at 6n), it strains credulity to accept, as the Government does, his gratuitous assertion that his questioning of petitioner was based on nothing more than a calculated guess as to what Mayersohn may have said to Probation Officer Mundy.

Moreover, it is perfectly clear from the opinion of the Court of Appeals that their decision was premised on the fact that the prosecutor had cross-examined petitioner Mayersohn on the basis of information obtained by him from Probation Officer Mundy, as shown by that Court's statement that "the use of this information [by the prosecutor] was improper under Rule 32(c) of the Federal Rules of Criminal Procedure" (Appendix A, at 5a; 413 F2d at 643).

3. It is highly significant that the Government concedes that probation officers do disclose to prosecutors confidential information secured by them from defendants in the course of preparing presentence reports (Brief in Opposition, at 6n). The Government treats this admission as if wholly unaware that it renders meaningless the assertion that probation officers do not make "probation reports" available to the prosecution, although it does explain why the Government so carefully casts its disclaimer solely in terms of access to the probation report itself. Nor does the Government deem it necessary to address itself to the propriety of such disclosures insofar as the rights of those defendants are concerned (see Petition, at 15-17). Nothing more strongly reinforces our position that this Court should direct its attention to the unholy relationship between probation officers and prosecutors than the conduct admitted by the Government in its Brief in Opposition.

4. The facts of the instant case squarely present for resolution by this Court the issue raised in the Petition, namely, the viability of the principle of confidentiality embodied in Rule 32(c) and the constitutional implications of sanctioning prosecutorial access to confidential information obtained by probation officers from defendants. It is not petitioner who has endowed the issue with its statutory and constitutional dimension. This flows directly from the decision of the Court of Appeals which impliedly condones a practice whereby the Federal Probation Office, an arm of the judiciary, is permitted to act as an investigative arm of the prosecution by making available to the latter, for use at trial, confidential information obtained from defendants. In view of the highly sensitive function performed by the Probation Office in our system of criminal justice, it is difficult to understand why the Government does not consider the compromising of that Office's integrity of sufficient importance even to warrant discussion. Its efforts to avoid this issue by simply denying its existence, and in less than ingenuous fashion at that, is truly a disservice to this Court.

CONCLUSION

For the foregoing reasons and those stated in our Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL S. FAWER
Counsel for Petitioner

STUART G. SCHWARTZ
of Counsel